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Originalism as a Constraint on Judges

William Baude

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William Baude†

One of Justice Antonin Scalia's greatest legacies is his promotion of constitutional originalism. He employed the interpretive philosophy on the bench and argued for it in print[1] and in speeches around the country. (Indeed, one of Scalia's speeches about originalism at The University of Chicago in 2003[2] was formative in provoking my own thinking on the subject.)

One important feature of Scalia's particular arguments for originalism was constraint—the idea that originalism was centrally a way, the best way, to constrain judicial decision-making, whereas nonoriginalist theories would essentially license judges to make up constitutional law as they went along. This motif appeared in various passages of his writing. For instance, he described as one of the chief virtues of originalism that it was "more compatible with the nature and purpose of a Constitution in a democratic system," because:

> The purpose of constitutional guarantees—and in particular those constitutional guarantees of individual rights that are at the center of this controversy—is precisely to prevent the law from reflecting certain changes in original values that the society adopting the Constitution thinks fundamentally undesirable. Or, more precisely, to require the society to devote to the subject the long and hard consideration

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1 See generally, for example, Antonin Scalia, *Originalism: The Lesser Evil*, 57 U Cin L Rev 849 (1989); Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson/West 2012); Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton 1997) (Amy Gutmann, ed).

2 See Andrew Moesel, *Justice Scalia Speaks at Law School* (Chicago Maroon, May 9, 2003), archived at http://perma.cc/WQ3K-SZYP.

> required for a constitutional amendment before those particular values can be cast aside.[3]

On the other hand, he argued, "the central practical defect of nonoriginalism is fundamental and irreparable: the impossibility of achieving any consensus on what, precisely, is to replace original meaning, once that is abandoned."[4] He elaborated:

> If the law is to make any attempt at consistency and predictability, surely there must be general agreement not only that judges reject one exegetical approach (originalism), but that they adopt another. And it is hard to discern any emerging consensus among the nonoriginalists as to what this might be.[5]

The central theme here is that originalism constrains judges from simply following popular pressures and, conversely, that nonoriginalists will not be able to produce a consistent and predictable system. Originalism may not be perfect on this score, but it is, Scalia said, the lesser evil.

In later work with Professor Bryan Garner, Scalia more explicitly emphasized the constraint of his methods of interpretation. "[S]ound interpretive conventions," they wrote, "will narrow the range of acceptable judicial decision-making and acceptable argumentation" and "will curb—even reverse—the tendency of judges to imbue authoritative texts with their own policy preferences."[6]

But time comes for both men and theoretical arguments. In this short Essay, I honor Justice Scalia with two observations about originalism and constraint. The first is that originalist scholars today are much more equivocal about the importance and nature of constraining judges. This is a point that may be obvious to those steeped in the latest originalist theory, but apparently cannot be stated often enough or clearly enough to those who are not.

The second observation, which relates to the first, is that the concept of constraint is ambiguous in several respects and that originalism may be better at some kinds of constraint than others. In particular, I emphasize the difference between

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3 Scalia, 57 U Cin L Rev at 862 (cited in note 1) (emphasis omitted).

4 Id at 862–63.

5 Id at 855.

6 Scalia and Garner, *Reading Law* at xxviii (cited in note 1).

external constraints, which help others to judge the interpreter, and internal constraints, which focus on allowing the interpreter to constrain himself or herself. As reflected and refined in modern scholarship, originalism may not be terribly good at the former, but it may be much better at the latter. In other words, originalism can still have constraining power, but mostly for those who seek to be bound.

I. THE DEATH OF CONSTRAINT?

Critics of originalism have leveled sustained, and sometimes persuasive, arguments against the justification of originalism as a constraint on judges. For instance, in a book-length treatment and critique of originalism, *The Failed Promise of Originalism*, Professor Frank Cross attempts to empirically study "[a] key argument for originalism," namely, "its ability to restrain willful judging."[7] He concludes that "reliance on originalist sources is not [ ] particularly constraining, so justices exercise their ideological preferences in cases using originalism as much as in other decisions."[8]

But the target of these critiques is most readily found in the work of older originalists, like Professor Raoul Berger, Judge Robert Bork, and Justice Scalia.[9] With Scalia's passing, these versions of the constraint argument no longer have a clear champion.[10]

By contrast, many modern originalists have tended to de-emphasize the importance of constraining judges, relying instead on other arguments—that originalism is normatively desirable for other reasons,[11] that it is an account of the true meaning of the constitutional text,[12] or that it is required by our law.[13]

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7 Frank B. Cross, *The Failed Promise of Originalism* 170 (Stanford Law 2013).

8 Id at 189.

9 See id at 11–12, 15–16, 19–20. See also, for example, Peter J. Smith, *The Marshall Court and the Originalist's Dilemma*, 90 Minn L Rev 612, 621 (2006) (discussing works by Scalia, Berger's book *Federalism: The Founders' Design*, Bork's book *The Tempting of America: The Political Seduction of the Law*, and Professor John Hart Ely's book *Democracy and Distrust: A Theory of Judicial Review*).

10 See Gary Lawson, *Reflections of an Empirical Reader (or: Could Fleming Be Right This Time?)*, 96 BU L Rev 1457, 1472 (2016) ("Old originalists, such as Raoul Berger and Robert Bork (at least before 1990), did not talk as I do. They did not discuss epistemology, concepts, communication, and the philosophy of language. They discussed such things as judges, democracy, constraint, and authority.") (citation omitted). Note that, in light of the importance of this temporal change, my citations in this piece largely focus on originalist work published in the last decade or so.

11 See, for example, John O. McGinnis and Michael B. Rappaport, *Originalism and the Good Constitution* 19–21 (Harvard 2013); Lawrence B. Solum, *The Constraint*

For instance, originalist Professors John McGinnis and Michael Rappaport write that while "the argument that originalism offers clearer rules to constrain judges than other interpretive approaches contains some truth," it "may not be enough to sustain the case for originalism."[14] Rather, "if constraint is the overriding objective, non-originalist doctrine may sometimes provide more constrained rules than the original meaning."[15]

Professor Gary Lawson, also an originalist, writes more skeptically: "If constraint and certainty are the goals, originalism is a relatively poor way to achieve it compared to numerous other methodologies."[16] Professor John Harrison, an originalist, concurs that he is "deeply skeptical of the capacity of any methodology," originalism included, "to constrain any interpreter," but adds that he "do[es] not think it is very important" whether originalism constrains or not.[17]

Another originalist, Professor Christopher Green, rejects the importance of constraint even more profoundly, arguing that originalism is not undermined even if the original meaning is "difficult to unearth," "enigmatic,"[18] and fails "to produce unique and indisputable answers to legal questions."[19] As Green puts it: "The purpose of *my* originalism, at any rate, is simply to get the constitutional truthmaker right, whatever dispute that might engender."[20] Similarly, originalist Professor Randy Barnett states that "the new originalism that is widely accepted by most originalists today is not an enterprise in constraining judges,

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Principle: Original Meaning and Constitutional Practice *58–83 (unpublished manuscript, Mar 24, 2017), archived at http://perma.cc/KN5Y-NDC8.

12 Lawson, 96 BU L Rev at 1458–64 (cited in note 10).

13 See generally, for example, William Baude, *Is Originalism Our Law?*, 115 Colum L Rev 2349 (2015); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 Harv J L & Pub Pol 817 (2015); William Baude and Stephen E. Sachs, *The Law of Interpretation*, 130 Harv L Rev 1079 (2017); Jeffrey A. Pojanowski and Kevin C. Walsh, *Enduring Originalism*, 105 Georgetown L J 97 (2016).

14 John O. McGinnis and Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 Nw U L Rev 383, 383 (2007).

15 Id at 384.

16 Gary Lawson, *No History, No Certainty, No Legitimacy . . . No Problem: Originalism and the Limits of Legal Theory*, 64 Fla L Rev 1551, 1554 (2012).

17 John Harrison, *On the Hypotheses That Lie at the Foundations of Originalism*, 31 Harv J L & Pub Pol 473, 473–74 (2008).

18 Christopher R. Green, *Constitutional Truthmakers*, 32 Notre Dame J L, Ethics & Pub Pol *17 (forthcoming 2018), archived at http://perma.cc/HXQ6-ST4N.

19 Id at *18, quoting Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment*, 112 Colum L Rev 1917, 1919 (2012).

20 Green, 32 Notre Dame J L, Ethics & Pub Pol at *18 (cited in note 18).

but an enterprise in determining what the writing really means."[21]

Thus, it may seem as if the argument that originalism is justified because it will eliminate judicial discretion has been refuted by originalism's critics and abandoned by its defenders. The most explicit recognition of this shift comes from Professor Thomas Colby, who writes that while "[j]udicial constraint" was once the "heart and soul" of originalism, the theory has since "sold its soul to gain respect and adherents."[22] The new incarnation of originalism, Colby writes, has "left behind more than just the theoretical flaws of its predecessor. It has also effectively sacrificed the Old Originalism's promise of judicial constraint. The very changes that make the New Originalism theoretically defensible also strip it of any pretense of a power to constrain judges to a meaningful degree."[23] Scalia's constraint argument, it may seem, is dead.

But perhaps things are not so simple. One of the most important modern theorists of originalism, Professor Lawrence Solum, emphasizes the "Constraint Principle."[24] This is the normative argument that original meaning *ought* to constrain constitutional practice, for reasons derived from legitimacy and the rule of law.[25] Solum's picture of constraint is nuanced, perhaps more so than Scalia's. He need not and does not assume that originalism eliminates all judicial construction.[26] But if originalism could not constrain judges at all, these normative arguments would not work. So the question remains—does originalism impose a meaningful constraint on judges?[27]

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[21] Randy E. Barnett, *The Golden Mean between Kurt & Dan: A Moderate Reading of the Ninth Amendment*, 56 Drake L Rev 897, 909 (2008).

[22] Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 Georgetown L J 713, 714–15 (2011). For a sample denial that originalism has sold its soul, see Stephen E. Sachs, *Saving Originalism's Soul* (Library of Law and Liberty, Dec 17, 2014), archived at http://perma.cc/RJ6E-CRU8 ("The soul of originalism is a method, not a collection of results.").

[23] Colby, 99 Georgetown L J at 714 (cited in note 22). See also Jeremy K. Kessler and David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U Chi L Rev 1819, 1846–47 (2016).

[24] See generally Solum, *The Constraint Principle* (cited in note 11).

[25] Id at *58–83.

[26] Id at *24–28. For Solum's disagreement with Scalia on this point, compare Scalia and Garner, *Reading Law* at 13–15 (cited in note 1), with Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 Fordham L Rev 453, 483–88 (2013).

[27] See Colby, 99 Georgetown L J at 751 (cited in note 22) ("New Originalists tend to argue that, although their theory does not completely eliminate judicial subjectivity and the potential for judicial mischief, it is still meaningfully constraining, at least in comparison to the alternatives.").

II. IT DEPENDS ON WHAT YOU MEAN BY CONSTRAINT

It is not entirely clear what it means to ask whether originalism, or any methodology, "constrains" judicial decision-making. It is therefore not clear whether originalism accomplishes it, or whether it would be a good thing if it did. So before interring the importance of originalism as a constraint, one should pause to see what that might mean. (Before going any further, though, it is worth one terminological clarification—I follow Professor Colby and others in using "judicial *constraint*" to refer to "promising to narrow the discretion of judges" while reserving "judicial *restraint*" to refer to "deference to legislative majorities.")[28]

First of all, there is the question whether any methodology at all can constrain decision-making, or whether methodologies and constraint are simply inapt, like asking whether grocery stores help one lose weight. There are at least two reasons to think they might be so inapt. One is that methodologies are not self-applying or self-enforcing. So no methodology is constraining in the sense that it can leap out of the law reviews and force judges to use it or even keep them from deviating from it once they have started.[29]

The other is that the performance of an interpretive methodology might be related to the materials it interprets. If the Constitution itself results in a lot of judicial discretion, then the methodology that truthfully enforces the Constitution will result in a lot of judicial discretion. But it is not clear whether that fault (if it is a fault) should be laid at the feet of the methodology or the Constitution.[30] Methodologies don't constrain, one might say; constitutions constrain.

But let us put these aside for a moment. Even so, there are further ambiguities: There is a question of how *forceful* of a constraint a methodology imposes. Does it impose a single right answer to the legal question at hand? Does it narrow down the

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[28] Id. See also Solum, 82 Fordham L Rev at 524–25 (cited in note 26); Randy J. Kozel, *Original Meaning and the Precedent Fallback*, 68 Vand L Rev 105, 112 n 26 (2015).

[29] See Anthony D'Amato, *Can Any Legal Theory Constrain Any Judicial Decision?*, 43 U Miami L Rev 513, 522–23 (1989) ("The reason theories work is that we expect them to work. But the subtlety here is that we can at best expect them to 'work' as *theories*; it is irrational for us to expect them to work in the sense of constraining practice.").

[30] See Green, 32 Notre Dame J L, Ethics & Pub Pol at *17–20 (cited in note 19); Steven G. Calabresi and Gary Lawson, *The Rule of Law as a Law of Law*, 90 Notre Dame L Rev 483, 487, 504 (2014). To be sure, others might respond that a Constitution doesn't do anything until it is interpreted.

range of right answers, but not necessarily to one? Does it provide a process or set of considerations for giving the right answer, even if different people applying the method might legitimately come to different conclusions? And there is the question of the *range* of cases in which the constraint operates. In particular, does it apply in all constitutional cases, or only a subset of them?

These different axes suggest that constraint is not a single, scalar variable. One methodology might produce unique right answers in a range of cases and no guidance in another range of cases. Is it less constraining than a methodology that produces a limited range of right answers, but in every single case? We could stipulate either type of constraint to be greater than the other, but ultimately these points suggest that we must define constraint more precisely before joining issue on how much a methodology does it, or whether it is a good thing.

I mention all of these points as a preliminary matter to one more distinction, one that may be the most underappreciated distinction between different types of constraint: *how* the constraint operates.

Consider two types of constraint: external and internal. An external constraint helps those who wish to judge the judge. If the judge misapplies (or ignores) the constraint, other people will be able to tell. Perhaps they will shame him, punish him, or even defy him. As Judge Frank Easterbrook puts it (in the preface to Scalia and Garner's book):

> Interpretation is a human enterprise, which cannot be carried out algorithmically by an expert system on a computer. But discretion can be hedged in by rules, such as those that this book covers in detail, and misuse of these rules by a crafty or willful judge then can be exposed as an abuse of power. A more latitudinarian approach to interpretation, by contrast, makes it hard to see when the judge has succumbed to the Dark Side of Tenure—which, like the Dark Side of The Force in *Star Wars*, is marked by self-indulgence.[31]

But that is not the only mechanism by which a constraint might operate. A constraint might also operate as an internal constraint, one that helps the willing judge. If the judge

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[31] Frank H. Easterbrook, *Foreword*, in Scalia and Garner, *Reading Law* xxi, xxiii (cited in note 1).

faithfully applies the constraint, it will help him to decide the case by telling how to get to the answer.

In principle, a constraint could operate in both respects, but some constraints will be more effective internally than externally. If a legal methodology is complicated or turns on questions of judgment, it may be hard for others to distinguish between honest disagreements on a question of applying the law and perhaps dishonest ones on whether to follow the law at all. This distinction between internal and external constraint helps paint two very different pictures of originalism as a constraint on judges.

A. Originalism as External Constraint

In one picture, originalism might strive to act as a strict external constraint. Through its force, scope, and simplicity, it serves as a way of controlling a judiciary run amok. This picture assumes that originalism will generally produce a single answer to disputed questions of constitutional law and that it will do so across many different kinds of cases. Moreover, it assumes that it will do so in a way that is externally enforceable. If a judge has deviated from originalism, others will be able to tell.

For instance, Professor Berger invoked the Fourteenth Amendment's "framers' intention," arguing that "[t]o 'interpret' the Amendment in diametrical opposition to that intention is to rewrite the Constitution."[32] He also stressed the importance of what I would call external constraint. He wrote that "[a] prime task of scholarship" like his was "to heighten public awareness that the Court has been overleaping its bounds."[33] And he rejected as contrary to "one of the most fundamental premises of our constitutional system"[34] the idea of placing our faith in the judiciary's "own sense of self-restraint."[35] And to emphasize the message of a judiciary run amok, the very title of his book was *Government by Judiciary*.

If this was ever the kind of constraint that originalism promised, one can see why it no longer seems so likely to do so. A version of originalism that focused strictly on the original

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[32] Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* 457 (Liberty Fund 2d ed 1977).

[33] Id at 464. He also advocated more aggressive enforcement, such as impeachment. Id at 463. See also Michael Stokes Paulsen, *Checking the Court*, 10 NYU J L & Liberty 18, 67–90 (2016).

[34] Berger, *Government by Judiciary* at 463 (cited in note 32).

[35] Id, quoting *United States v Butler*, 297 US 1, 79 (1936) (Stone dissenting).

intent or originally expected applications of the text might have been able to deliver such a constraint over a certain domain (applications actually foreseeable by the Framers). On that version, if the death penalty or congressional chaplains or what have you existed when the constitutional provision was enacted, that is all we need to know now.[36]

But originalists do not adhere to this version of originalism—for good reason[37]—and instead focus on the public meaning or legal meaning of the text. This sort of inquiry is comparatively less likely to supply broad external constraints. For instance, there are disputes or confusion about the proper level of generality at which to read various provisions of the constitutional text.[38] And while these disputes have good answers,[39] they make it harder for originalism to serve as a consistent external constraint. To be sure, some forms of strict textualism, with relatively few sources of extrinsic evidence, can be relatively effective as an external constraint. As Professor Alexander Volokh has put it, such a method has a "high implausibility cost," meaning that it renders more outcomes facially implausible.[40] On the other hand, the more a theory introduces extrinsic sources, canons, and methods, the less effective that theory will be as an external constraint, because it will have an increasingly "low implausibility cost," with more interpretations potentially plausible.[41]

Furthermore, many versions of originalism acknowledge substantial "construction zones" in which "the meaning of 'the constitutional text does not provide determinate answers to

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36 Consider Steven D. Smith, *That Old-Time Originalism*, in Grant Huscroft and Bradley W. Miller, eds, *The Challenge of Originalism: Theories of Constitutional Interpretation* 223 (Cambridge 2011).

37 See Sachs, *Saving Originalism's Soul* (cited in note 22) ("But the old originalism was abandoned for a reason, namely that it was wrong.").

38 See generally, for example, Peter J. Smith, *Originalism and Level of Generality*, 51 Ga L Rev 485 (2017).

39 See, for example, Christopher R. Green, *Originalism and the Sense–Reference Distinction*, 50 SLU L J 555, 563–74 (2006); Lawrence Solum, *Smith on Originalism & Levels of Generality* (Legal Theory Blog, Apr 3, 2017), archived at http://perma.cc/4K4K-B3E7.

40 Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 NYU L Rev 769, 795–96 (2008) ("For instance, textualism may be a method with a high implausibility cost if text tends to be determinate, or if Webster's Second or the Oxford English Dictionary is the only acceptable dictionary.").

41 Id at 796–97 ("Conversely, [textualism] may have a low implausibility cost if all dictionaries and canons (both textual and substantive) are fair game.").

constitutional questions.'"[42] In these zones, "officials must act—by assumption—'on the basis of normative considerations that are not fully determined by the communicative content of the constitutional text.'"[43]

Even originalists who argue that those construction zones can be narrowed or filled in through other originalist arguments—such as the deployment of appropriate default rules,[44] the use of the original legal methods or original interpretive rules,[45] or the use of what Professor Stephen Sachs and I have called the "law of interpretation"[46]—would likely acknowledge that the outputs of those methods remain quite disputed. There is no canonical book of original methods, no codex containing all of the law of interpretation.[47] And even if there were, those methods would be subject to dispute in their application. These disputes are not intractable or unresolvable, by any means, but their resolution requires substantial research and legal judgment. The same seems to be true for other candidate theories of construction.[48] These theories may each be deeply coherent, but it is both costly and difficult for an outside observer to say at a glance whether the original meaning has been followed in a given case. And this, in turn, makes it harder to apply external constraints to originalist judges.

These difficulties are exacerbated by other important theoretical advances in originalism. Just to name three,

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42 Baude and Sachs, 130 Harv L Rev at 1128 (cited in note 13), quoting Solum, 82 Fordham L Rev at 458 (cited in note 26).

43 Baude and Sachs, 130 Harv L Rev at 1128 (cited in note 13), quoting Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 Notre Dame L Rev 1, 5 (2015).

44 See, for example, Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 Nw U L Rev 857, 915 (2009); Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 Harv J L & Pub Pol 411, 424–28 (1996).

45 See generally, for example, John O. McGinnis and Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case against Construction*, 103 Nw U L Rev 751 (2009).

46 Baude and Sachs, 130 Harv L Rev at 1097–1120 (cited in note 13).

47 Scalia and Garner, *Reading Law* at 9 (cited in note 1) ("The reader may well wonder: Where are all these interpretive canons to be found? Are they tidily collected somewhere in a code? Generally, no."). But see id (suggesting that the book was "the first modern attempt . . . to collect and arrange only the valid canons").

48 See, for example, Randy E. Barnett and Evan Bernick, *The Letter and the Spirit: The Judicial Duty of Good-Faith Constitutional Construction* *41–62 (working paper, 2017), archived at http://perma.cc/TXH4-MEKR. The most easily applicable might be default rules, such as those discussed in the sources cited in note 44.

originalists generally countenance some use of precedent,[49] generally have some way of distinguishing between the applications of a text (which can change) and the meaning of a text (which cannot),[50] and may have some way of taking account of unwritten background principles or assumptions.[51] Each of these additional variations makes application of the theory more complicated and more subject to good-faith dispute, and therefore harder to subject to collective constraint or discipline.

None of this is to say that originalism lacks *any* externally constraining force. It may well still be better than some other methodologies. For instance, Sachs and I have previously alleged that it compares favorably to "'pragmatism'—under which it's wickedly difficult to tell whether its practitioners are doing it right or wrong."[52] But there are also probably methodologies that are still better at external constraint. Perhaps theories centered around heavy deference to other branches or strong stare decisis, for example, could make it easier to judge the judiciary's behavior, because it is comparatively transparent when a law is being struck down or a precedent is being overruled.[53] In short, originalism may not be the best tool to constrain the wayward judge.

B. Originalism as Internal Constraint

But consider a different picture of originalism as constraint. The target of this constraint is not the wayward judge, but the

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[49] See Baude, 115 Colum L Rev at 2358–61 (cited in note 13) (reviewing originalist scholarship on precedent).

[50] See Green, 50 SLU L J at 559–60 (cited in note 39); Jack M. Balkin, *Living Originalism* 23, 27–32 (Belknap 2011).

[51] See generally, for example, Stephen E. Sachs, *Constitutional Backdrops*, 80 Geo Wash L Rev 1813 (2012); Randy E. Barnett, *The Misconceived Assumption about Constitutional Assumptions*, 103 Nw U L Rev 615 (2009).

[52] William Baude and Stephen E. Sachs, *Originalism's Bite*, 20 Green Bag 2d 103, 105 (2016). See also Michael Stokes Paulsen, *How to Interpret the Constitution (and How Not To)*, 115 Yale L J 2037, 2061–62 (2006) ("[I]t is easier to spot an errant would-be originalist interpretation than an errant nonoriginalist . . . interpretation. The existence of reasonably firm criteria makes it easier to check up on originalist interpretations for the soundness of their reasoning and their adherence to correct principles.").

[53] This transparency exists unless, perhaps, the judiciary can avail itself of aggressive forms of "interpreting" statutes to avoid invalidating them, see Caleb Nelson, *Avoiding Constitutional Questions versus Avoiding Unconstitutionality*, 128 Harv L Rev F 331, 333–39 (2015), or "narrowing" precedents to avoid overruling them, see Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 Colum L Rev 1861, 1867–74 (2014).

puzzled judge.[54] This judge would *like* to be able to apply the law without importing nonlegal considerations and is searching for a method that will help her do it. Even if the method is sufficiently complicated or involves sufficient discretion, such that it is hard for outsiders to use the method as a way of monitoring judicial behavior, it can still serve to discipline and guide an individual judge who chooses to apply it. As Professor Green has put it, "If it matters to no one else, the existence of an external legal standard surely matters *to the ultimate interpreter*; the phenomenology of making the law on one's own is surely quite different from that of interpreting someone else's law."[55]

In what sense might this be called "constraint," and why might any constraints of this sort be desirable? One function of this kind of internal constraint is to wall off or reduce certain considerations that might be tempting, but undesirable.[56] For instance, a judge told only to "do the right thing" or "use your judgment" might import political and even partisan considerations in a way that might be undesirable. Or imagine a judge who is deciding whether a category of searches is permissible under the Fourth Amendment and who wishes to avoid the hindsight bias of knowing what the search at hand turned up. Without an internal constraint, even a well-meaning judge might not be able to resist the power of hindsight.

Another related function is providing a resource for treating like cases alike and different cases differently. Such equal treatment is often taken to be a central requirement of fairness and the rule of law. But as the legal realists loved to point out, all cases are alike in some respects and different in some respects. It depends on the axis of similarity and difference.

A methodology that imposes internal constraint gives judges an answer for what counts as a like case and what counts as a different one. Almost any methodology that is minimally constraining will tell a judge that he ought not distinguish a previous case on the grounds that it was decided on a Tuesday but today is Wednesday.[57] And a truly constraining methodology

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[54] See H.L.A. Hart, *The Concept of Law* 40 (Oxford 3d ed 2012) ("Why should not law be equally if not more concerned with the 'puzzled man' or 'ignorant man' who is willing to do what is required, if only he can be told what it is?").

[55] Green, 32 Notre Dame J L, Ethics & Pub Pol at *10 (cited in note 19).

[56] See William Baude and Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 U Chi L Rev 539, 552–54 (2017).

[57] Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J App Prac & Process

can go further, suggesting what the relevant axis is—for instance, whether a given search invaded a positive-law right,[58] or whether a given punishment was painful and contrary to long usage.[59]

For instance, imagine a judge confronted, a few years ago, with the controversy over whether the Fourteenth Amendment requires states to allow same-sex couples to marry. And imagine that the judge wishes to be constrained. She thinks it would be wrong to impose her own views of marriage on the country, and therefore seeks a legal criterion that does not depend on her own views and that will guide her in deciding whether or not to extend the various arguments of *Loving v Virginia*[60] and *Lawrence v Texas*.[61] If originalism provides a way to determine the original legal force of the Fourteenth Amendment—to determine the scope of the rights it protects and the nature of its equality guarantee—then originalism can supply the internal constraint the judge seeks. And originalism can do so even if it is not so clear-cut as to provide an external constraint. Even if the question is a fairly debatable one, there is "[n]o reason [ ] why we cannot conclude for ourselves that one side has the better of it, even if by a nose, and even while admitting that a disagreeing colleague could see it the other way."[62]

219, 223 (1999):

> One party cites a previous opinion as binding precedent. The other party says it is distinguishable, and, upon being asked why, says that the previous case was argued on a Tuesday, whereas this case is being argued on a Wednesday. This circumstance, admittedly a factual difference, is obviously irrelevant. Why? Because the factual difference—the day on which the case is being argued—has nothing to do with the governing legal principles. The example is extreme, and deliberately so, but I believe it illustrates the point.

See also Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 Vill L Rev 273, 278–79 (2008).

58 See generally William Baude and James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 Harv L Rev 1821 (2016). See also Baude and Sachs, 20 Green Bag 2d at 107 (cited in note 52).

59 See John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 Nw U L Rev 1739, 1745 (2008) ("[T]he word 'unusual' was a term of art that referred to government practices that are contrary to 'long usage' or 'immemorial usage.'"). See also Samuel L. Bray, *"Necessary and Proper" and "Cruel and Unusual": Hendiadys in the Constitution*, 102 Va L Rev 687, 712–13 (2016).

60 388 US 1 (1967).

61 539 US 558 (2003).

62 Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 Case W Reserve L Rev 905, 917 (2016).

It is more plausible that originalism fits this second picture of constraint—at least if it is supplemented with a theory that narrows or fills in construction zones. Even if such theories are sufficiently complicated that they do not easily yield *consensus* or rule most interpretations out of bounds as *implausible*, they still provide a method that can be divorced from various nonlegal considerations. Originalism can provide a sort of procedural constraint by pushing aside some arguably illegitimate considerations from the judge's mind; and it can provide an internal substantive constraint by helping judges see their way toward the right answers.

On this picture, originalism provides internal constraints by going beyond ordinary constitutional pluralism.[63] Originalism either excludes some methods of constitutional reasoning, provides a structure determining when other methods are applicable, or both.[64] Similarly, originalism—at least as Sachs and I have seen it—provides a metric by which claims about constitutional law can be judged.[65] While that metric may sometimes require a great deal of historical research and theoretical nuance, it still allows individual interpreters to come up with their own best assessments of constitutional meaning. And while various forms of originalism may still call for the exercise of discretion and normative judgment, they are guided in an important way. As Sachs and I have written, "these are 'normative' judgments in the sense that they're judgments about norms—particularly those held by other people—not in the sense that they involve first-order normative reasoning about what is to be done."[66]

Originalism has this kind of constraint by dint of having a certain kind of "constitutional truthmaker"—an ultimate criterion by virtue of which constitutional claims are true or false. Having such a truthmaker at all is the first step toward internal constraint. Further constraint comes from the nature of originalism's truthmaker. The fact that it is largely removed

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63 See Jamal Greene, *The Age of Scalia*, 130 Harv L Rev 144, 151 (2016) ("[I]t is in fact easy to discern a consensus as to the alternative to originalism. . . . [T]he alternative is pluralism.").

64 Baude, 115 Colum L Rev at 2353 (cited in note 13) ("Pluralists argue that our practice is a set of competing methods, none of which dominates the others. Whereas those pluralist conceptions are flat, under my view they are hierarchically structured, with originalism at the top of the hierarchy.") (citation omitted).

65 Baude and Sachs, 20 Green Bag 2d at 104–06 (cited in note 52).

66 Baude and Sachs, 130 Harv L Rev at 1145 (cited in note 13) (emphasis omitted).

from the most salient moral issues of the day can be a virtue here. It means that applying originalism is a way to limit the relevance of political or moral criteria that judges may feel an obligation to push aside.

To be sure, originalism does not lay unique claim to internal constraint. Any constitutional theory with a single truthmaker can lay some such claim, and there are important nonoriginalist theories that might qualify.[67] But other common competitors to originalism, such as unstructured pluralism or incrementalism, may not.

Interestingly, while Scalia has been widely read to favor the external picture of constraint, there are passages in his writing that seemed to demonstrate some awareness of internal constraint, as well. For instance, in an early concurring opinion in *James B. Beam Distilling Co v Georgia*,[68] he described the Constitution's "judicial power" as being "the power 'to say what the law is,' not the power to change it."[69] He seemed candid about the internal nature of this constraint, adding:

> I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense "make" law. But they make it *as judges make it*, which is to say *as though* they were "finding" it—discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be.[70]

In later writing, he disparaged another judge's attempt to "escape from theorizing" in constitutional law and rely on "[w]isdom" and "good sense" in terms that emphasized *internal* constraint.[71] Scalia professed "great fear" that such a judge who

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67 See Green, 32 Notre Dame J L, Ethics & Pub Pol at *23–25 (cited in note 19) (listing examples). A particularly promising nonoriginalist single-truthmaker theory is described in Mitchell N. Berman, *Our Principled Constitution* (University of Pennsylvania Public Law and Legal Theory Research Paper No 17-15, Mar 15, 2017), archived at http://perma.cc/5UQV-SQXN (attempting to derive a positivist system of constitutional principles from social facts).

68 501 US 529 (1991).

69 Id at 549 (Scalia concurring in the judgment) (citation omitted), quoting *Marbury v Madison*, 5 US (1 Cranch) 137, 177 (1803).

70 *Beam*, 501 US at 549 (Scalia concurring in the judgment). Professor William N. Eskridge Jr suggested that Scalia's Tanner Lectures, later published as *A Matter of Interpretation*, cited in note 1, "can be read as a manifesto for such an 'as-though' philosophy of statutory interpretation." William N. Eskridge Jr, *Textualism, the Unknown Ideal?*, 96 Mich L Rev 1509, 1556 (1998).

71 Scalia and Garner, *Reading Law* at 27–28 (cited in note 1).

attempts to escape theory "will lack an objective basis for judging. Do the injunctions 'be modest' and 'be restrained' mean always deferring to the wishes of the legislature? And if not always, then how are the appropriate occasions to be identified?"[72] It seems that the problem Scalia was concerned with was the lack of any actual criterion, or "objective basis." Similarly, when he praised originalism for "establish[ing] a historical criterion that is conceptually quite separate from the preferences of the judge himself,"[73] he seems to be speaking in terms of internal constraint.[74] The very mechanism of internal constraint is the creation of a conceptually separate criterion for judging—something the judge can use to guide his decisions, if he wishes to.

III. IS CONSTRAINT IMPORTANT?

Whatever kind of constraint originalism imposes—internal, external, both, neither—there remains the question whether we should care. Despite what I have written above, I think there are plausible arguments that we should not. As several of the newer originalists have written, if we start with the premise that the Constitution is binding law, then perhaps our task should simply be to read the Constitution and do what it says.[75] Sometimes it may result in constraints, and sometimes it may not.

Even if one complicates this picture by adding that there are multiple ways to read a text, one might again say[76] that the originalist task is not to pick among these readings on primarily normative grounds, but rather to pick the one that is part of our legal system, which happens to proceed in continuity from the Framers' law. And this seems not to turn on whether a methodology is constraining—we could achieve far stronger constraints, at least as an external matter, by telling judges to flip a coin[77] or to always rule in favor of the government.[78]

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72 Id at 28.

73 Scalia, 57 U Cin L Rev at 864 (cited in note 1).

74 See John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 Mich L Rev 747, 749–50 (2017) ("I contend that an insistence upon decisional justifications external to the judges' will, and not a naked preference for rules, provided the central grounding for all of Justice Scalia's commitments.").

75 See sources cited in note 30.

76 Indeed, I have said so. See generally Baude, 115 Colum L Rev 2349 (cited in note 13).

77 Sachs, 38 Harv J L & Pub Pol at 886 (cited in note 13).

78 Greene, 130 Harv L Rev at 152 & n 45 (cited in note 63).

But even in such positive or authority-based models of originalism, there is a role for normative arguments about constraint. After all, the decision to follow the Constitution as law, and to follow any particular legal rules for interpreting it, still has a normative aspect. I have argued (following Professor Richard Re) that judges have a prima facie obligation to obey the law, and hence the original meaning of the Constitution, because of their oath and democratic role.[79] But the words "prima facie" reveal that this "cannot wholly eliminate" normative considerations but rather can only "postpone and transform" them.[80] If originalism were entirely unconstraining, that might still provide a reason to worry that our current legal regime was in need of improvement[81] and warrants change.

There is another, more practical point. If a method of interpretation provided very little constraint in any sense, we might worry that was a clue that our method of interpretation was not a very accurate picture of the meaning it was trying to capture. We might worry that Professor Colby was right that originalism had become so capacious as to lose any meaning—had become an exercise in theater rather than law. Indeed, we might worry that such a method was not law at all. Fortunately, however, that charge does not seem to be true of originalism, even today.

Again, this is not to say that its ability to constrain judging is the most important thing about originalism. If that were the way we chose constitutional theories, we would choose something else. But it remains of some importance that originalism operates as an internal constraint, that it guides the "puzzled" judge. That fact sets originalism aside from what has been called its greatest competitor—constitutional pluralism, most forms of which fail to contain a single "truthmaker."[82] And it suggests that even as originalism has grown more sophisticated, it has actually kept some faith with one of Justice Scalia's central insights about interpretation—the importance of believing in something larger than yourself.

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79 Baude, 115 Colum L Rev at 2393–95 (cited in note 13). See also generally Richard M. Re, *Promising the Constitution*, 110 Nw U L Rev 299 (2016).

80 Baude, 115 Colum L Rev at 2394–95 (cited in note 13).

81 Assuming, that is, that our Constitution is one worth being constrained by. Compare generally Louis Michael Seidman, *On Constitutional Disobedience* (Oxford 2012), with Ilan Wurman, *A Debt against the Living: An Introduction to Originalism* (Cambridge 2017).

82 Green, 32 Notre Dame J L, Ethics & Pub Pol at *21–23 (cited in note 19).